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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

DEWEY SOWDERS, WARDEN — PETITIONER

- versus -

CLAUDE EARN CARTER — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

What standard is to be applied in determining whether a criminal defendant who is free on pre-trial bond has voluntarily waived the right to attend a deposition and confront his/her accuser?

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Dewey Sowders, Warden of the Northpoint Training Center and the Attorney General of the Commonwealth of Kentucky Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, granting a writ of habeas corpus in favor of respondent.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (A 1-27) is reported as Carter v. Sowders, ___ F.2d ___ (6th Cir. 1993). The order of the Sixth Circuit denying the Commonwealth's petition for rehearing is not reported and is found at (A 28-30). The opinion of the United States District Court is not reported. (A 50-51). (October 31, 1991). The Magistrate Judge's Report, adopted by the District Court, is not reported and is reproduced at (A 31-49). The opinion of the Kentucky Supreme Court affirming the conviction is reported as Carter v. Commonwealth, Ky., 782 S.W.2d 597 (1989).

JURISDICTION

The judgment sought to be reviewed is that of the United States Court of Appeals for The Sixth Circuit decided and filed September 27, 1993. Carter v. Sowders, ___ F.2d ___ (No.

91-6419) [Appendix cited as "A"] (A 1-27), reversing the October 31, 1991 judgment of the United States District Court for the Western District of Kentucky (Civil Action No. 90-0197BG(M) (A 50-51). A Petition for Rehearing was denied December 16, 1993 (A 28-30). The jurisdiction of the United States District Court was invoked pursuant to Title 28 U.S..C. §2254. This Court has jurisdiction to review the opinion of the Sixth Circuit Court of Appeals pursuant to Title 28 U.S.C. §2254(1).

CONSTITUTIONAL STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same

> offence [sic] to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the Constitution of the United States provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Due Process Clause of Section 1 of the Fourteenth Amendment of the Constitution of the United States provides as follows:

> [N]or shall any State deprive any person of life, liberty, or

property without due process of law[.]

STATEMENT OF THE CASE

Respondent was tried in Kentucky state court for possession and sale of marijuana and LSD and being a first-degree persistent felony offender following an investigation spanning Tennessee and Kentucky. Charles Elam was a salaried narcotics agent with the Dyersburg Tennessee Police Department. Elam and Billy Driskell purchased marijuana and LSD from respondent in Kentucky and then returned to Tennessee where Elam reported to the Union City Police Department. (A 1-3).

Elam was a material and necessary witness for the Commonwealth. The prosecutor feared he could not produce live testimony from Elam at trial, so to preserve that testimony, he moved to videotape Elam's deposition. Using the Non-Resident Witness Act in Tennessee (T.C.A.

40-17-203) and then in Oklahoma (22 Okl.St.Ann. §722), Elam was brought to Kentucky on June 30, 1986 for a court-ordered deposition. (A 3-7).

It is uncontradicted that opposing counsel, Hon. Louis Waller, received timely notice of the deposition via letter and appeared at the scheduled hour. (A 34; A 52-58). Waller advised respondent of the deposition by letter and tried to reach him by phone the day before the deposition as well. Unable to locate his client, and feeling insufficiently prepared to cross-examine Elam, Waller served notice of his intention to withdraw as counsel and left the deposition. Counsel said he had not required respondent's presence at the deposition and had told respondent "you may wish to be present" at the deposition, assuming this would prompt respondent to contact him to discuss strategy. (A 54).

Respondent, free on pre-trial bond, never contacted Waller. Before leaving the deposition, Waller acknowledged he was bound to represent respondent until the court released him from that obligation. Waller left, Elam was sworn, and the prosecutor questioned Elam without respondent or Waller.

Trial began January 6, 1987. Elam could not be found. Phone calls went unanswered, mail was returned as undeliverable and a subpoena naming Elam was issued but not served. (A 38-39). The Commonwealth successfully moved to admit Elam's sworn videotaped deposition in lieu of live testimony. Respondent's new attorney, Hon. Robert Hedges, objected to use of the deposition and tried to quash it due to respondent's absence and alleged lack of representation and cross-examination. The motion to quash was denied, but not until trial. (A 6-7).

Respondent was found guilty of trafficking in LSD and possession of marijuana on January 7, 1987. The court recessed for the evening with direction that trial resume with the penalty phase the following morning at 9:00 a.m. Respondent remained free on bail and did not return. After waiting well over an hour, and hearing testimony from respondent's father that respondent departed at 2:00 a.m., the trial court allowed the jury to set punishment in respondent's voluntary absence.

The Kentucky Supreme Court affirmed the conviction finding respondent waived the right to confront Elam. Carter v. Commonwealth, Ky., 782 S.W.2d 597 (1990). The opinion holds: respondent waived the right to confront Elam; counsel received ample notice of the taking of the deposition and consciously decided not to remain at the deposition and cross-examine Elam; the record was devoid of evidence respondent had

a legal reason for not attending the deposition; there was no proof respondent's presence would have made a difference; counsel neither requested a continuance nor objected to the taking of the deposition; the Commonwealth made a good faith effort to produce live trial testimony from Elam; and, the Commonwealth could not use the Uniform Non-Resident Witness Act at trial since Elam's whereabouts were unknown and therefore, Elam was unavailable at the time of trial. Id.

After this Court denied respondent's petition for certiorari, he sought a writ of habeas corpus in federal district court under 28 U.S.C. §2254. The magistrate judge recommended denial of the petition, and the district court agreed, finding: Elam's deposition was properly admissible under F.R.C.P. 804 pursuant to the "declarant unavailable/former testimony" exception to the hearsay rule; respondent, via

his attorney, had the opportunity to cross-examine Elam but did not seize it; respondent was not denied counsel at a critical stage as Waller represented respondent until the trial court granted the motion to withdraw; while counsel could have moved to postpone the deposition, he did not; the Commonwealth made a good faith effort to present live trial testimony from Elam; the Commonwealth could not subpoena Elam or use the Non-Resident Witness Act for trial because the prosecution was unable to locate Elam; and, Elam could not be subpoenaed for trial while testifying at the deposition as that would have violated KRS 421.260. (A 31-49). The district court adopted the magistrate judge's report in full and denied the petition for writ of habeas corpus. (A 50-51).

The United States Court of Appeals for the Sixth Circuit reversed the decision of the

district court finding respondent was entitled to the writ because: Elam's deposition was hearsay and erroneously admitted; without cross-examination, the jury lacked sufficient basis to evaluate the truthfulness of Elam's deposition; respondent was denied the opportunity to confront Elam; even if respondent received Waller's letter it was incomplete in that it failed to tell respondent he had a constitutional right to attend the deposition and failed to specify the consequences of failing to attend; and finally, respondent did not personally waive his right of confrontation. (A 1-27). A Petition for Rehearing was denied. (A 28-29).

REASONS FOR GRANTING THE WRIT

The focus of this petition is whether a criminal defendant who is free on pre-trial bond waives the right to confrontation by not attending a deposition of which he/she has

notice. The Sixth Circuit answered this question in the negative based upon Johnson v. Zerbst, 304 U.S. 458, 464 (1938), which requires "intentional relinquishment of a known right or privilege," and Boyd v. Dutton, 405 U.S. 1, 2-3 (1972), which directs that a right "may be waived only by voluntary and knowing action." (A 20-21). Under the Sixth Circuit's interpretation of Zerbst, inaction could never constitute waiver. Furthermore, a personal on-the-record statement by the defendant would be required for valid waiver. The byproduct of this ruling is that an attorney could never enter a valid waiver for his client, even if he did so with express authority of the client. While personal waiver from the accused may be preferred, it is not constitutionally mandated. United States v. Polizzi, 926 F.2d 1311, 1322 (2nd Cir. 1991).

The Sixth Circuit's approach is inconsistent with this Court's opinions in Diaz v. United States, 223 U.S. 442, 451-3 (1912) and Taylor v. United States, 414 U.S. 17 (1973), both of which clearly hold voluntary absence from a proceeding constitutes waiver. Even the Second Circuit has realized requiring a personal in-court statement from the accused to effectuate a valid waiver would create a "burdensome, impractical and wholly unnecessary" rule which taken to its logical conclusion "would work the unwieldy result of leaving ineffective as a waiver the voluntary failure to appear for trial." Polizzi, at 1322; United States v. Sanchez, 790 F.2d 245, 250 (2d Cir.), cert. denied 479 U.S. 989 (1986). This is precisely the situation created by the Sixth Circuit opinion. After being notified of a court-ordered deposition, respondent neither contacted his attorney, nor appeared at the

deposition. Although respondent has never denied knowing about the deposition, and has never explained his absence, the Sixth Circuit refused to find respondent's voluntary absence waived his right of confrontation.

The rationale for permitting voluntary absence to constitute valid waiver was ably expressed by this Court in Diaz:

> "It does not seem to us to be consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he pleased, to withdraw himself from the courts of his country and to break up a trial already commenced. The practical result of such a proposition, if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it. For by the statute (U.S. Rev. Stat. § 1015, U.S. Comp. Stat. 1901, p. 718) he is entitled as a matter of right to be enlarged upon bail 'in all criminal cases where the offense is not punishable by death;' and therefore, in all such cases, he

may, by absconding, prevent a trial. This would be a travesty of justice which could not be tolerated; and it is not required or justified by any regard for the right of personal liberty. On the contrary, the inevitable result would be to abridge the right of personal liberty by abridging or restricting the right now granted by the statute to be abroad on bail until the verdict is rendered.

. . .

"The question is one of broad public policy, whether an accused person, placed upon trial for crime, and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries, and turn them into a solemn farce, and ultimately compel society, for its own safety, to restrict the operation of the principle of personal liberty. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the

> pendency of a trial before a jury, to operate as a shield."

Diaz, at 506 citing Falk v. United States, 15 App.D.C. 446, 454, s.c. 180 U.S. 636, 45 L.Ed. 709, 21 Sup. Ct. Rep. 923. As further stated in Diaz,

> where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present. (citations omitted).

223 U.S. at 455.

While both Diaz and Taylor pertain to confrontation in the context of absentia from trial, the same concerns exist during a pre-trial deposition. Chiefly, those concerns are that a defendant who is free on bond can ignore notification of a court-ordered

proceeding and disrupt the legal process by avoiding the courthouse. Various courts have applied the "voluntary absence constitutes waiver" standard to pre-trial depositions. For example, in Owings v. State, 622 N.E.2d 948, 953 (Ind. 1993), the Indiana Supreme Court held a defendant waived the right to confrontation by failing to attend a deposition. Owings was free on bond at the time of the deposition and is presumed to have received notice because her attorney was served. The only hint in the record that Owings's absence may not have been a voluntary relinquishment of a known right is that the deposition was taken in a youth detention facility from which her entry was barred. However, because Owings never asked that she be allowed to enter the facility, and never asked that the deposition be moved to another location, the court determined she had

indeed waived her constitutional right to confrontation.

Similarly, in United States v. King, 552 F.2d 833 (9th Cir. 1976), voluntary absence was an effective waiver. The defendants and their attorneys balked at restrictions imposed by the Japanese government when depositions of two drug offenders imprisoned in Japan were taken for use at trial in America. "[T]he witnesses were under oath; the defendants were represented by counsel with the opportunity for cross-examination; and the proceedings were before an authorized hearing officer who was equipped to take and preserve the testimony." Id., at 842-3. During cross-examination of the first witness, the defendants and their attorneys refused to participate further and left. The second witness was deposed wholly outside the presence of the defendants or their

counsel. Citing Zerbst, the Ninth Circuit stated:

> By absenting themselves from the proceedings, by failing to avail themselves of the opportunity to cross-examine the Government witnesses, even if under less than perfect conditions, the appellants intentionally and knowingly gave up both the right to be present and to object to future use of the testimony. It was a calculated act, undertaken with knowledge of the potential consequences.

Id., at 844.

Since voluntary absence can validly waive presence at trial, there is no logical reason for a different standard to apply to a pre-trial deposition. This is especially true since "voluntary absence" has also been held to waive the right to attend a pre-trial hearing. In United States v. Rewald, 889 F.2d 836, 854 (9th Cir. 1991), the Ninth Circuit found the accused voluntarily waived the right to attend a hearing in Hawaii because he "earlier had sought

and obtained bail conditions that permitted him to reside in Los Angeles, California, where he had a job paying $1,000 per week." In finding no violation of the right to confrontation, the court noted: Rewald never told the trial court he wanted to personally attend the hearing; counsel never objected to his client's absence; and the trial court never entered any order prohibiting Rewald's attendance at the hearing. This same analysis applies equally well to a pre-trial deposition. Thus, the language of Brewer v. Raines, 670 F.2d 117, 119 (9th Cir. 1982), "When, after sufficient notice, a defendant voluntarily absents himself from any proceeding, he waives any right he has to be present at that proceeding," is both appropriate and accurate. In short, a defendant who is free on bond should not be allowed to circumvent a court order simply by avoiding the courthouse.

The primary concern is whether a criminal defendant who takes no action knows he has the right to act. In other words, does he have notice? Once a party is represented by counsel, service of notice upon counsel constitutes notice to the client. United States v. Everett, 700 F.2d 900, 902 n.5 (1983); See generally In re Oliver, 333 U.S. 257, 273 (1948). In our system of representative litigation, each party is bound by the acts of his lawyer-agent. Link v. Wabash Railroad Co., 370 U.S. 626, 634 (1962); Irwin v. Veterans Administration, 498 U.S. 89 (1990). There is no contention respondent's attorney did not receive notice of the deposition. In fact, respondent's attorney cleared his schedule to attend the depostion. (A 53-54). Counsel then sent a letter to respondent advising him of the deposition and tried to reach respondent via

family members when respondent failed to contact him. (A 54-55).

Having determined respondent was aware of the scheduled deposition, how could he validly waive his presence at the deposition and his right to confront an adverse witness? Waiver can occur in a myriad of ways. For example, the accused could agree not to cross-examine witnesses or stipulate to the admission of evidence. United States v. Carlson, 547 F.2d 1346, 1358 (8th Cir. 1976). He could waive through repeated disruptive and disorderly conduct. Illinois v. Allen, 397 U.S. 337, rehearing denied 398 U.S. 915 (1970). He could enter a guilty plea, Boykin v. Alabama, 395 U.S. 238 (1969), or he could fail to return from a recess. Taylor, supra. Despite these various methods of effectuating a valid waiver, the Sixth Circuit has declined to recognize that a defendant voluntarily relinquishes a known

right by not attending a pre-trial deposition of which he has notice. Further, while other courts plainly adhere to the principle that "[a]bsence without compelling justification constitutes waiver," the Sixth Circuit has granted relief without any such showing. Respondent has never been required to offer any explanation, compelling or otherwise, for his absence. United States v. Wright, 932 F.2d 868, 879 (10th Cir. 1991); United States v. Peterson, 524 F.2d 167, 184-5 (4th Cir. 1975) cert. denied, 423 U.S. 1088 (1976).

Diaz and Taylor clearly establish that voluntary absence from trial constitutes valid waiver of the right to be present at trial and to confront adverse witnesses. The Sixth Circuit has misinterpreted Zerbst, supra to require a personal on-the-record statement from the accused to waive the right of confrontation at a pre-trial deposition. This view

contradicts precedent from this Court as well as state and federal circuit courts.

Respondent bears a heavy burden of demonstrating entitlement to a writ of habeas corpus. Nevertheless, the Sixth Circuit has granted the writ even though respondent has offered no proof in support of his claim that he was denied the right of confrontation. Under Polizzi, King and Taylor, supra, his voluntary failure to attend the deposition should have been deemed waiver of the right to be present and to confront Elam. At a minimum, the Sixth Circuit should have allotted the burden to respondent to prove lack of notice as this was a habeas corpus proceeding. Polizzi, at 1321. Instead, the Sixth Circuit has placed the onus upon the Commonwealth to prove respondent personally received actual notice and consented to counsel's conduct. Thus, the Sixth Circuit has erroneously granted a writ of habeas corpus

when the most to which respondent was entitled was a hearing in federal district court to give him yet another opportunity to explain why he did not attend Elam's deposition and why he failed to contact his attorney.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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